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REMARKS

The following Remarks are fully responsive to the Office Action set forth above. Claims 28-35 are pending in the current application. In the above-identified Office Action, the Examiner rejected claim 28-35. By this Response, the Applicant hereby submits terminal disclaimers to obviate rejections on the ground of nonstatutory obviousness-type double patenting. The Applicant traverses the Examiner's rejection of claims 28-35 under 35 U.S.C. § 102(e).

Double Patenting

The Examiner has rejected claims 28-35 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over certain claims in U.S. Patent Nos. 6,544,168, 6,375,608, 6,165,122, 6,077,218, 5,702,343, 6,126,590, and 6,165,121. The Applicant traverses the double-patenting rejection by submitting herewith a terminal disclaimer relating to each of the above-identified U.S. patents.

Additionally, the Examiner has provisionally rejected claims 28-35 on the ground of non-statutory obviousness-type double patenting as being unpatentable over certain claims in co-pending U.S. Patent Application Nos. 10/668,528, and 10/810,099. The Examiner has also provisionally rejected claims 28-35 on the ground of non-statutory obviousness-type double patenting as being unpatentable over certain claims in U.S. Patent Application No. 10/660,460, which is unrelated to the pending application. The Applicant believes that the Examiner meant to cite U.S. Patent Application No. 10/668,460 in the provisional rejection based on non-statutory obviousness-type double patenting. Accordingly, the Applicant traverses the provisional double-patenting rejection by submitting herewith a terminal disclaimer relating to U.S. Patent Application Nos. 10/668,460, 10/668,528, and 10/810,099. Withdrawal of the rejections on the ground of non-statutory obviousness-type double patenting is respectfully requested.

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Claim Rejections – 35 USC § 102

Claims 28-35 were rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent 6,508,756 (“Kung”). The Applicant respectfully traverses.

The Kung patent discloses, in relevant part, a “girdle” for limiting the maximum diastolic dimension of the heart. The disclosed girdle is made of “a number of interlinked two-dimensional loops such as lightweight plastic rings 133” which “are interconnected to form the girdle or wrap 130. The loops are free to move in all directions without restraint, since none are physically connected to each other.” No specific types of plastic are disclosed for the rings, and no other types of materials are disclosed.

In contrast, Claim 28 recites an apparatus comprising a biomedical material formed in a jacket. The biomedical material includes shape-memory material. Those of ordinary skill in the art would understand a “shape memory material” to be a very specific type of material having temperature-dependent geometry characteristics. After being deformed, these particular materials will return to an original geometry or shape upon reaching a temperature above a transition temperature for the particular material. A well-known example of a shape memory material is nitinol.

The Office Action asserts that the material of the girdle of Kung patent has inherent shape memory properties. The Office Action also assert that absent these properties, the device shown in the Kung patent would not function as intended. For a number of reasons, the Applicant respectfully disagrees with this position.

Nothing in the Kung patent suggests the need for the aforementioned properties of shape memory materials in order for the girdle disclosed therein to function as intended. To the contrary, because the rings are “free to move in all directions without restraint,” the girdle of the Kung patent can expand and contract with the heart due to the relative movement of the individual rings with respect to each other. Shape memory properties are not needed to achieve this functionality.

It is not clear from the Kung patent whether the device exhibits elastic properties. The statement that the disclosed girdle “presents no systolic load to the contracting heart,” for example, may suggest that the device is not elastic. However, even assuming for

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purposes of analysis that the device shown in the Kung patent does have elastic properties, those skilled in the art would not construe such elastic materials as necessarily being shape memory materials.

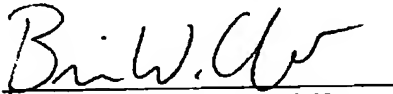
The term "plastic" by itself, as applied to a class of materials, does not fairly suggest shape memory materials having the well known characteristics discussed above. No other materials are disclosed or suggested for use in the interlocked ring girdle in the Kung patent. Furthermore, use of the generic term "plastic" in describing the rings suggests that the Kung patent did not contemplate any of the unique properties of shape memory materials.

In conclusion, the Applicant respectfully asserts that claim 28, as previously presented, is patentable over the teachings of the Kung patent, and is in condition for allowance. Additionally, claims 29-35, which depend from claim 28, are patentable over the Kung patent and in condition for allowance for at least the same reasons. Reconsideration and withdrawal of the rejection under 35 U.S.C. § 102(e) based on the Kung patent is respectfully requested.

The Applicant respectfully requests that a Notice of Allowance be issued in this case.

Respectfully Submitted,

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